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IN THE

Supreme Court of the United States

October Term, 1998

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, AND ELLIOT STAMLER,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

(Caption Continues on Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT-INTERVENOR TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(Caption Continued From Front Cover)

AMSTERDAM VIDEO, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

This is to certify that respondent-intervenor Times Square Business Improvement District has no corporate parents or non-wholly owned subsidiaries.

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Respondent-Intervenor Times Square Business Improvement District requests that the Court deny the petition for a writ of *certiorari* seeking review of an opinion of the Court of Appeals for the Second Circuit reported at 146 F.3d 99 (2d Cir. 1998).

SUMMARY OF THE ARGUMENT

No matter how petitioners clamor for a second bite at the apple, the fact is that the Second Circuit correctly resolved petitioners' First Amendment claim under the doctrine of collateral estoppel. Because the federal and state standards at issue are exactly the same, the unanimous decisions of the state courts to uphold the City's zoning ordinance were based on an inquiry into the *identical factual issues* pertinent to the federal Constitutionality of the Resolution: *i.e.*, the City's intent in enacting its zoning ordinance and the sufficiency of available locations for relocation. The failure of petitioners to produce evidence on these factual issues in state court doomed their First Amendment claim.

Petitioners, who avidly sought to litigate in state court, are not entitled to waste judicial resources and conduct repetitive litigation by abusing the reservation procedure set forth in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). An *England* reservation is intended to benefit parties *forced* into state court, not those who vigorously sought to have the state courts litigate all their claims. Moreover, *England* applies to *claim* preclusion, and does not bar the effect of collateral estoppel with respect to factual issues decided in the state court. Thus, *England* has no bearing on petitioners' ability to re-litigate issues already resolved in the earlier proceedings.

Finally, the Constitutionality of New York's zoning Resolution is unambiguous. Sixteen judges, sitting in five different courts, have agreed that the Resolution is aimed at negative secondary effects rather than content, and that it provides petitioners with alternative avenues of communication

that amply satisfy the requirements of the First Amendment. Because the zoning ordinance falls safely within the Constitutional parameters explicated by this Court, this Court need not expend its limited resources to examine what was, in essence, a straightforward application of this Court's First Amendment doctrine as set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

REASONS FOR DENYING THE WRIT

THE SECOND CIRCUIT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL.

A. A purported *England* reservation does not preclude the application of collateral estoppel on these facts.

Petitioners seek to frustrate the application of collateral estoppel by means of their purported *England* reservation. However, as this Court made clear in *England*, an *England* reservation is intended to protect parties *forced* to litigate in state court. *See England*, 275 U.S. at 415 ("[T]here are fundamental objections to any conclusion that a litigant *who has properly invoked the jurisdiction of a Federal District Court* to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.") (emphasis added). Here, by contrast, petitioners unreservedly submitted both state and federal claims to the courts of New York State in the first instance, and vigorously fought to keep all their claims in that forum. *Cf. Migra v. Warren City Sch. District Bd.*, 465 U.S. 75, 85 n. 7 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (*England* applies where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim") (emphasis added); *England*, 375 U.S. at 421 (stressing that, in abstention context, a party's *choice* of federal forum must be protected).

That a reservation of federal claims pursuant to *England* exists only for the benefit of parties forced to litigate claims in state court against their will is the unanimous view of the Courts of Appeals.[1] *See, e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304-6 (11th Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979) ("Appellants from the early days of their dispute with the City have sought to have their federal claims heard in a federal court.").

Here, by contrast, it was clear from the beginning that petitioners hoped that the state constitution would prove more helpful to them than the First Amendment as applied by this Court:

> That is why petitioners filed 13 state law claims in state court, with a sole federal claim that they themselves described as an "adjunct" to their state causes of action. *See, e.g.*, Brief of Amsterdam Video in Support of Motion to Remand at 28 ("[I]n our case, not only is the federal claim an adjunct to the state claims, but it is factual (*sic*) intertwined with the state charges"); Beth Haroules (for the Hickerson petitioners), Transcript of Oral Argument on Motion to Remand, at 7 ("Your honor, the federal claim is asserted as an adjunct to the state constitution.").

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[1] Certain of the federal courts of appeals consider the fact that a party filed first in state court to be dispositive, *see, e.g., Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988), while others evaluate the totality of the evidence that a party was "forced" to litigate in the state court and the extent to which the litigant submitted to state court jurisdiction. *See, e.g., United Parcel Svc. v. California Public Utils.*, 77 F.3d 1178, 1186 (9th Cir. 1996). Not one appellate court, however, has intimated — nor could any, in light of *England*'s emphasis on protecting a party's *choice* of forum — that a party may proceed to federal court *regardless* of its intent to litigate the same claims in an earlier state proceeding.

That is why petitioners fought so vigorously to remain in state court when confronted with respondents' notice of removal to federal court.

That is why, in stark contrast to the position they take before this Court, petitioners assured the federal district court that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into the adequacy and suitability of [the alternative] sites." Brief of Amsterdam Video in Support of Motion to Remand at 20.

That is why petitioners filed the affidavit of their expert, Robert McLaughlin, knowing full well that (as the state court found) it incorporated "the same methodology" that this Court had "specifically rejected" in *Renton. Stringfellow's v. City of New York*, 653 N.Y.S. 2d 803, 810 (N.Y. Sup. Ct. 1996) (*"Stringfellow's I"*).

Thus, petitioners can in no sense be said to have been *forced* to litigate in state court. To the contrary, petitioners filed all their claims in state court. Removal was effected only over their vehement protest and followed by a motion to remand in which petitioners proclaimed the adequacy of the state court to determine all their claims. *See Hickerson v. City of New York*, 932 F. Supp. 550, 556 (S.D.N.Y. 1996) ("*Hickerson I*") ("[P]laintiffs' state claims are remanded . . . Plaintiffs, however, want more. They seek to have their federal constitutional claims decided by a state court.").

Moreover, even if it were applicable here, *England* only operates to preserve *claims* a party wishes to bring to the attention of the federal court, rather than *issues* that were necessarily resolved by the State court. *England* does not abrogate the requirement that federal courts rely on the resolution of issues resolved in an earlier proceeding. *See, e.g., Wicker v. Bd. of Educ. of Knott County*, 826 F.2d 442, 448-49 (6th Cir.1987) ("Even though [plaintiff] reserved his federal claims in state court, there still can be issue preclusive effect

accorded to both state court findings of law and findings of fact."); *Bradley*, 913 F.2d 1064 at 1073 ("As the Court recognized in *England*, even a litigant who has made a valid reservation may not relitigate an issue he/she unreservedly litigated in state court."). *See also* Restatement (Second) of Judgments § 86, cmt. f, illus. 7 (1982) (stating that factual issue litigated in state court may not be relitigated, although federal claims may have been reserved). Thus, even if petitioners had not vehemently insisted on litigating in state court — as they did — *England* would have no bearing on the final resolution of factual issues relevant to petitioners' federal claim.

B. Because the federal and state standards are the same, the Second Circuit properly applied collateral estoppel with regard to issues decided by the state court.

Given that *England* has no place here, the Second Circuit was correct to make its straightforward decision that petitioners' inability to withstand summary judgment in the state courts signaled a similarly fatal dearth of evidence with respect to petitioners' federal claim. Collateral estoppel is routinely applied by the federal courts where, as here, a prior decision was based on the same standards applicable to a later proceeding. *See Allen*, 449 U.S. at 94 (stating that federal courts traditionally have followed rules of issue preclusion and *res judicata*). As the Second Circuit rightly concluded, the courts of New York state have incorporated the federal free speech standard into state law. *See, e.g., Stringfellow's v. City of New York*, 694 N.E.2d 407, 415 (N.Y. Ct. App. 1998) (*"Stringfellow's II"*) (reviewing *Renton* and other federal precedents and extensively citing federal cases as well as parallel state opinions in support of ruling under state law).

Comparing the law of the two jurisdictions indeed reveals that the standards are identical. The New York state and federal free speech standards both subject a zoning regulation to the *same* two inquiries. First, the ordinance must be justified

by a purpose unrelated to content; specifically, the desire to combat negative secondary effects associated with adult establishments. *See, e.g., Renton*, 475 U.S. at 48 (stating that relevant question is whether the "predominant intent" of zoning law is "unrelated to the suppression of free expression"); *Stringfellow's II*, 694 N.E.2d at 415 (inquiry is whether ordinance is "purposefully directed at controlling the content of the message conveyed through adult businesses" rather than "aimed at an entirely separate societal goal"). Second, adult uses must be left with a reasonable opportunity to exist in the marketplace. *See, e.g., Renton*, 475 U.S. at 50 (ordinance must allow for "reasonable alternative avenues of communication"); *Stringfellow's II*, 694 N.E.2d at 418 (explaining that, under state law, ordinance must be "no broader than necessary" in that it "assure[s] reasonable avenues of communication," and that "ample space" must remain for adult uses).[2]

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[2] In a dramatic reversal of their position throughout the state court litigation, petitioners argue that the federal courts "require a more rigorous examination of alternative locations" than that deemed sufficient by the state courts. *See, e.g.*, Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14. In fact, no federal court has required a showing of specific sites for relocation, as petitioners contend. Indeed, it would be impracticable to require cities to designate specific sites for relocation: since most zoning ordinances impose a distance requirement between adult businesses, where one adult business may locate depends in part on where another adult business has located.

Despite petitioners' criticism of New York City's evidence as overly "abstract," the City's designation of land in fact is indistinguishable from the assessment conducted by many of the federal courts cited favorably by petitioners. *See, e.g., Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995) ("[T]he collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the . . . Ordinance. . . . [V]irtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available."); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("Nothing in the instant record permits us to say that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure. . . . Thus, although the record does not

In the state court proceedings, petitioners failed entirely to raise any genuine, material issue of fact regarding the ability of New York's zoning Resolution to satisfy the two-prong standard set forth above. Put simply, petitioners cast doubt on neither the City's purpose nor the availability of alternate locations. As the district court noted, the virtually unrebutted evidence produced by New York City supported the following conclusions: (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Resolution is no broader than necessary to prevent those adverse effects; and (4) the City "more than sufficiently demonstrated" that the permissible areas for adult establishments remaining in the City are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. *See Hickerson I,* 997 F. Supp. 418 at 423 (citing *Stringfellow's I,* 653 N.Y.S.2d at 803, 808, 809, 814).

In light of petitioners' inability to create doubt as to either of the two relevant prongs, the doctrine of collateral estoppel — as well as ineluctable logic — required the Second Circuit to reject the efforts of petitioners to relitigate the precise same issues that had been decided in the state courts.

Petitioners attempt to characterize the application of collateral estoppel in this case as an abdication of duty by the federal courts. The truth is just the opposite. This Court has clearly stated that federal courts *must* give estoppel effect to issues and claims resolved in the state courts. *See Migra*, 465

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permit us to say with precision how many additional sites exist, a substantial number do."); *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988) ([T]he district court made no findings with respect to the actual number of potential sites available . . . . However, that deficiency does not hinder us because we can roughly estimate the number of available sites . . . .").

U.S. at 84; *Allen*, 449 U.S. at 95-96. Not only does the doctrine of collateral estoppel conserve judicial resources, "but [it] also . . . promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. The decision of the Second Circuit to hold petitioners to issues as litigated in the state courts served the interests of federalism as well as judicial economy and common sense.

THIS COURT SHOULD NOT OVERTURN, NOR NEED IT REVISIT, RENTON.

Since *Renton* was decided only a little over than a decade ago, the lower courts have relied on its clear precepts to evaluate the constitutionality of dozens of municipal ordinances. The instant case is well within the mainstream of these cases, and there is no reason to revisit *Renton,* let alone overturn it.[3] Under *Renton*, as well as the identical state standard, the zoning ordinance at issue unquestionably is Constitutional.

Unlike ordinances that test the limits of Constitutional regulation, New York City's Resolution is well within the standards set by this Court; indeed, it leaves space to

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[3] Petitioners urge this Court to intervene by claiming a "conflict" between the Second Circuit and two opinions of the Fifth and Ninth Circuit courts of appeals. *See, e.g.,* Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14 (citing *Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995)). Such a conflict is belied, most obviously, by the fact that every court that has ruled on the Resolution thus far — including the Second Circuit — has cited these two cases in its discussion of the First Amendment without perceiving any conflict with other circuits or shortcoming on the part of the ordinance. Moreover, to the extent that these cases do purport to exclude land that is physically or practically unavailable — *e.g.,* underwater or allocated for airport use — New York City's 4 % figure represents land available *after* the exclusion of properties unlikely ever to become available for commercial use from its initial figure of 11%. *See Stringfellow's II*, 694 N.E. 2d at 419.

accommodate far more than the number of establishments that may seek to relocate. As the Second Circuit noted, New York City offered evidence that, *"after excluding land identified by the City as being unlikely to be developed for commercial use,* 4 % of the total land area of the City remained open to adult establishments . . . [A]fter factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available." *See Hickerson v. City of New York*, 146 F.3d 99, 1078 (2d Cir. 1998) (*"Hickerson II"*) (emphasis added) (citing *Stringfellow's II*, 694 N.E.2d 407 at 418). The Second Circuit recognized that the ordinance leaves no shortage of alternative avenues of communication, given that "this land could accommodate . . . approximately *three times* the number of establishments that currently exist." *Id.* at 109. In agreement with the district court and each of the state courts, the Second Circuit accepted the City's evidence that all the areas in Manhattan zoned for adult use and 80% of the land in other boroughs are within a 10-minute walk from a subway line or major bus route.

In lieu of presenting this Court with reasons to overturn a carefully considered ruling of recent vintage, petitioners here simply have tried to relitigate matters flatly disposed of by *Renton*. The essence of their petition to this Court is not, as they claim, that any conflict or departure from judicial norms necessitates resolution by this Court. Rather, it is that petitioners seek to overturn *Renton* itself.[4]

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[4] Ironically, in light of their attack on *Renton*, petitioners argue that they have been estopped from urging the reconsideration of federal free speech standards. In fact, petitioners lobbied for a modification of the First Amendment standards set forth by this Court before both the district court and the Second Circuit, pressing the novel argument that *Renton* requires cities to identify specific sites, and asking the Second Circuit to conduct an unprecedented borough-by-borough analysis of the ordinance. The current posture of this case itself is the clearest evidence that, far from being forced to subsist under an unreviewable decision of the state court, petitioners remain free to urge their interpretations of *Renton* and its progeny upon this Court, as they unsuccessfully did in three state courts, the district court and

That petitioners seek to overturn *Renton* is evident in that their interpretation of governing law is the same as that of the Ninth Circuit in *Renton* itself. But this Court *reversed* the decision of the Ninth Circuit, which had struck down the city of Renton's ordinance in part because the 520 acres of available land included a sewage plant, a horse racing track, a business park containing only buildings suitable for industrial use, a warehouse, an oil tank farm, and a fully-developed shopping center.[5] In *reversing* that decision, this Court commented that the land available included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space . . . ." Here, in direct contravention of *Renton*'s teaching, and instead in accordance with the methodology rejected in *Renton*, petitioners' expert excluded land that is industrially zoned, zoned for warehouses, currently used as a parking or storage lot, subject to a long-term lease, currently housing hazardous waste, or requires a permit to change its zoning classification.

Ignoring for the moment the fact that petitioners' strategy is in derogation of the rulings of countless lower courts, it also is in blatant disregard of *Renton*'s clear mandate that the fact that adult establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54. At bottom, all of petitioners' mischaracterizations of governing law and attempts to exclude viable relocation sites on the basis of factors deemed impermissible by this Court amount to one thing: an end run around *Renton*. That is why they have attempted to force a strained, impracticable standard for assessing alternative

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the Second Circuit.

[5] *Cf.* Petition of the Hickerson Plaintiffs For Writ of *Certiorari* at 8 (criticizing relocation sites offered by the City including "Manhattan's Flower District . . . the Rockefeller Center Complex . . . Bronx Terminal Market, Hunts Point Sewage Treatment Plant," *etc.*).

locations on every court that has rejected their claims. That is why they fought so hard to litigate in state court in hopes that they might evade *Renton* altogether.

Petitioners do not seek the protection afforded by the First Amendment. Rather, they seek protection that exceeds the protection afforded to all other businesses subject to zoning: to wit, specific retail locations guaranteed to be immediately available, desirable, and economically viable. This Court should not indulge that demand at the expense of its own precedent, the law of the circuits, and the "high respect" to which a city's attempt to preserve the quality of urban life is due. *Renton*, 475 U.S. at 50 (citing *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976)).

CONCLUSION

For the reasons stated above, the petitions for a writ of *certiorari* to review the decision of the Second Circuit should be denied.

December 2, 1998

Respectfully submitted,

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